

**VERMONT ENVIRONMENTAL BOARD**  
**10 V.S.A. §§ 6001-6092**

*Re: The Van Sicklen Limited Partnership*  
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Land Use Permit  
Application #4C1013R-EB

**MEMORANDUM OF DECISION**

This proceeding concerns an appeal by Friends of Muddy Brook Basin ("FMBB") from a decision by the District 4 Environmental Commission ("Commission") granting a permit to The Van Sicklen Limited Partnership ("VSLP") for a residential development in South Burlington.

This decision addresses a number of Preliminary Issues raised by the parties.

This decision also addresses the Williston Planning Commission's notice that it intends to participate as a party in this appeal.

**I. Background**

In April 1999, the Vermont Environmental Board ("Board") issued a decision denying an application for a 55 lot subdivision (with 55 single family homes) on a 61-acre tract of land off of Hinesburg Road (Route 116) and Van Sicklen Road in South Burlington's Southeast Quadrant. *Nile and Julie Duppstadt & Deborah and John Alden*, #4C1013 (Corrected)- EB, Findings of Fact, Conclusions of Law, and Order (April 30, 1999). The grounds for denial were that the project failed to comply with 10 V.S.A. §6086(a)(8), (9)(B) and (10) (local plan) ("Criteria 8, 9(B) and 10 (local plan)").

The parcel at issue in *Duppstadt* was subsequently sold to VSLP, which, with Deborah and John Alden, filed an application for a redesigned project on the parcel. The Commission treated the application as a reconsideration request under 10 V.S.A. § 6087(c) and Environmental Board Rule ("EBR") 31(B).<sup>1</sup>

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<sup>1</sup> Although FMBB argues in its filings that the Commission perhaps should not have treated the instant matter as a reconsideration, it did not appeal the Commission's

On December 4, 2000, the Commission issued Land Use Permit #4C1013R ("Permit") and supporting Findings of Fact, Conclusions of Law, and Order ("Decision") to the VSLP. The Permit authorizes the VSLP to construct a planned residential development, known as "Old Stone House Farm," consisting of 28 single-family residential lots, 20 detached carriage home units and one homestead parcel (containing the existing farm house) to be served by municipal water and sewer facilities (the "Project"). The Project also involves construction of 2100 linear feet of new public street and 875 feet of new private roadway with related utilities. The Project is, as noted, located on the former Dupstadt property.

On January 3, 2001, FMBB filed a Motion to Alter the Permit and the Decision with the Commission. On February 2, 2001, the Commission issued Memorandum of Decision and Order denying the Motion to Alter.

On March 2, 2001, FMBB filed an appeal with the Environmental Board from the Permit and Decision, and the Memorandum of Decision and Order on the Motion to Alter, alleging that the Commission erred in its conclusions concerning 10 V.S.A. § 6086(a)(1)(E), 1(G), 4, 5, 8, 9(B), 9(C), 9(K), and 10 ("Criteria 1(E), 1(G), 4, 5, 8, 9(B), 9(C), 9(K) and 10"). FMBB also appeals the Commission's denial of party status to FMBB on Criteria 9(B), 9(C), 9(K), and it appeals the Commission's apparent determination not to include Criterion 9(K) in its review.

On March 16, 2001, VSLP filed a cross-appeal with the Environmental Board. VSLP alleges that the Commission erred in expanding the scope of its review under EBR 31(B)(2) to include Criterion 5. VSLP alleges further that the Commission erred by expanding the scope of review to include Criteria 1(E), 1(G) and 4. VSLP further appeals the Commission's grant of party status to FMBB on Criteria 1(E), 1(G), 4, 5, 8 and 10.

On April 10, 2001, FMBB filed a Motion to Amend/Clarify Statement of Issues, a Motion to Dismiss Applicant's Cross-Appeal on Party Status, and a Petition for Party Status on Criteria 1(E), 1(G), 4, 5, 8 and 10.

On April 10, 2001, Environmental Board Chair Marcy Harding convened a Prehearing Conference with the following participants:

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decision to do so, and, therefore, the Board considers this particular issue to be closed.

VSLP by Stephen Crampton, Esq.  
South Burlington Planning Commission ("SBPC") by Julie Beth Hoover  
Town of Williston Selectboard ("Williston") by Michael Munson  
FMBB by Stephanie Kaplan, Esq.

The Williston Planning Commission has since filed an April 18, 2001 letter with the Board noting that it joins with the Selectboard as a party in this matter.

In the Prehearing Order, with the parties' assistance, the Chair defined five Preliminary Issues:

1. Whether review of Criteria 1(E), 1(G), 4 and 5 by the Board is foreclosed under the doctrines of *res judicata* and/or collateral estoppel, or should not otherwise be undertaken.
2. Whether this matter should be reviewed for compliance with Criterion 9(K).
3. Whether FMBB's Motion to Dismiss the VSLP's Cross-Appeal on Party Status should be granted.
4. Whether FMBB should be granted EBR 14(B) party status on Criteria 1(E), 1(G), 4, 5, 8, 9(B), 9(C), 9(K) and 10.
5. Whether the Board should conduct a site visit of the Project Tract in the Spring of 2001.

Following the Prehearing Conference, VSLP and FMBB filed extensive briefs, addressing these Issues.

The Board deliberated on the Preliminary Issues on May 16 and June 6, 2001.

## **II. Discussion**

The Board's decision on certain of the issues informs its decision on others. The Board therefore has addressed the issues in a different order from that which appears in the Prehearing Order.

### **A. Whether FMBB's Motion to Dismiss the VSLP's Cross-Appeal on Party Status should be granted.**

Before the Commission, FMBB sought EBR 14 (B)(1) and (2) party status on Criteria 1(E), 1(G), 4, 5, 8 (aesthetics), 8(A) (wildlife habitat),<sup>2</sup> 9(B), 9(C), 9(K)<sup>3</sup> and 10 (local plan). The Commission granted FMBB EBR 14(B)(1) party status on Criteria 5, 8, 8(A) and 10 and EBR 14(B)(2) party status on Criteria 1(E), 1(G), 4, 8, 8(A) and 10.

FMBB appealed the Commission's denial of party status on Criteria 9(B), 9(C) and 9(K). VSLP cross-appealed the Commission's grant of party status to FMBB on Criteria 1(E), 1(G), 4, 5, 8, and 10.

VSLP's cross-appeal of the grant of party status to FMBB is narrow. It does not challenge the interests asserted by FMBB under the Criteria. It merely states:

Permittee appeals the granting of party status to FMBB under Criteria 1(E), 1(G), 4, 5, 8, and 10 by the District 4 Environmental Commission because, while FMBB states it is an organization that consists of eighteen families, FMBB has provided no records or basis of its existence, its membership and the authority to participate in the District Commission proceedings and the appeal recently undertaken by the organization. Further, Permittee lacks knowledge of who all those families presently are, the properties they own, and their location in relation to the Project in order to gage the alleged impacts generated by the Project. The same information is necessary to evaluate the petitions for expanded party status by FMBB in its Notice of Appeal.

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<sup>2</sup> Criterion 8(A) is not on appeal to the Board, and the Board therefore does not address FMBB's party status as to this Criterion.

<sup>3</sup> FMBB's February 8, 2000 party status petition to the Commission does not mention Criterion 9(K) in its opening paragraph, but it is clear from the rest of the petition that it sought Criterion 9(K) party status.

As FMBB notes (*FMBB's April 10, 2001 Motion to Dismiss* at 2), EBR 14(B)(3)(b) requires that an organization seeking party status need only "describe the organization, its membership and its purposes." *Sugarbush Resort Holdings, Inc.*, #5W1045-15-EB (Interlocutory), Order at 3 (July, 15, 1997). There is no requirement in the Rule that an organization provide "records or basis of its existence" or "the authority to participate in the District Commission proceedings" or an appeal. Nor is there any requirement that FMBB disclose "who all [the eighteen] families presently are." See *Re: St. Albans Group and Wal\*Mart Stores, Inc.*, #6F0471-EB, Memorandum of Decision at 8 (May 11, 1994) ("...Citizens have described their organization, its membership and its purposes. There is no requirement that they go further and produce the names and addresses of the members"); accord, *The Home Depot USA, Inc.*, #1R0048-12-EB, Memorandum of Decision at 9 (Nov. 30, 2000).

As to VSLP's claim that it has no information as to "the properties [FMBB's members] own, and their location in relation to the Project in order to gage the alleged impacts generated by the Project," *VSLP Notice of Cross-Appeal* at 2 –3, FMBB notes that it complied with the requirement in EBR 14(B)(4) that it provide a "description of the location of the petitioner's property in relation to the proposed project, including a map, if available" in its party status petition filed with the Commission. *FMBB's April 10 Motion to Dismiss* at 2. Attached to *FMBB's April 10 Motion to Dismiss* is a map which describes and shows the location of the property owned by FMBB members and the VSLP property; this is all that is required under Rule 14(B)(4). VSLP concedes that "FMBB's tender of an updated tax map at the prehearing conference showing the location of its members' properties satisfies Applicant's request for information and disclosure of the specific names and addresses by FMBB is not needed." *VSLP April 26 Response* at 2.

The grounds given by VSLP as the bases of its cross-appeal of FMBB's party status on Criteria 1(E), 1(G), 4, 5, 8, and 10 are without merit. The Board grants FMBB's motion to dismiss. FMBB has EBR 14(B)(1) party status on Criteria 5, 8, and 10 and EBR 14(B)(2) party status on Criteria 1(E), 1(G), 4, 8, and 10.

**B. Whether FMBB should be granted EBR 14(B) party status on Criteria 1(E), 1(G), 4, 5, 8, 9(B), 9(C), 9(K) and 10.**

As the Board grants FMBB's Motion to Dismiss, FMBB has party status on Criteria 1(E), 1(G), 4, 5, 8, and 10. The only remaining questions are whether to grant FMBB's appeal and petition for party status under Criteria 9(B), 9(C) and 9(K).

FMBB sought but was denied party status on Criterion 9(B), 9(C) and 9(K) before the Commission. FMBB has appealed these denials. *Springfield Hospital*, #2S0776-2-EB, Memorandum of Decision at 3 (Aug. 14, 1997), *appeal dismissed, In re Springfield Hospital*, No. 97-369 (Vt. Sup. Ct. March 19, 1998) (party status decisions by District Commissions may be challenged by appeal or cross-appeal); *Gary Savoie d/b/a WLPL and Eleanor Bemis*, #2W0991-EB, Findings of Fact, Conclusions of Law, and Order at 7 (Oct. 11, 1995); *Spring Brook Farm Foundation, Inc.*, #2S0985-EB, Memorandum of Decision at 7 (July 18, 1995).

### **1. Criterion 9(B)**

FMBB asserts that its members, who live in the immediate area of (and some of whom own land adjoining) the proposed Project, have an interest in the protection of the agricultural soils in their neighborhood. Many moved to the area because of the agricultural character of the area. FMBB is concerned that the "loss of agricultural soils on this site, along with the presence of a dense housing development adjacent to a working farm, is likely to lead to the demise of agriculture in this area of South Burlington over time." *FMBB March 2, 2001 Petition for Party Status* at 5. Further, because the Auclairs no longer participate in this matter, FMBB is the only party which will provide evidence and testimony on the question of primary agricultural soils.

The Board notes at the outset that non-farmers can seek and obtain party status on Criterion 9(B). In *Spear Street Associates*, #4C0489-1-EB, Memorandum of Decision at 3 (April 4, 1984), the Board wrote:

Appellant further argues that only individuals with a specific interest in farming have standing to participate in consideration of Criterion 9(B). We reject this argument.... [W]e believe that "the development or subdivision of primary agricultural soils," the subject treated by Criterion 9(B), can have a direct impact on the property interests of farmers and non-farmers alike.

VSLP puts forth two arguments in opposition to FMBB's Petition. First, it asserts that FMBB's mission is limited to protecting "the unique and special qualities of Muddy Brook, its wetlands, wildlife corridor and surrounding lands." *VSLP April 25 Memorandum* at 14. But VSLP fails to acknowledge that FMBB's mission is broader than this limited phrase. As noted in *FMBB's April 10 Petition for Party Status* at 1, FMBB is organized also "to promote development which is in keeping with the existing character of the area; and to promote local community awareness." FMBB's mission, therefore, does not act to prevent its Criterion 9(B) party status petition.

Second, VSLP argues that the individual property owners' interests have been subsumed into FMBB's organizational interests. VSLP asserts that, because FMBB, as an organization, does not own property, and "because its specific published interest is the protection of Muddy Brook and its adjacent wetlands, FMBB is estopped from being able to demonstrate that its interest will or may be affected under [Criterion] 9(B)....." *VSLP April 25 Memorandum* at 20.

The Board finds no merit to VSLP's subsumption claim. As FMBB notes, to adopt this argument would inhibit group participation in the Act 250 process, something which the Board has, in the past, encouraged as an efficient means to present the jointly-held views of a number of individuals. *See FMBB May 3 Memorandum* at 10. Further, were the facts to be different – were a group's purpose to protect vanishing farmland but none of its members owned land near or adjoining a proposed project – one might predict that the applicant would argue that the Board should not look to the group's purpose, but should look instead to the status and circumstances of its members.

The Board grants EBR 14(B)(1) party status on Criterion 9(B) to FMBB.<sup>4</sup>

## **2. Criteria 9(C) and 9(K)**

### **a. EBR 14(B)(1) party status**

The Board finds that FMBB has not presented arguments sufficient to support a petition for EBR 14(B)(1) party status on either Criterion 9(C) or Criterion 9(K).

Specifically, as noted, in its petition for both Criterion 9(B) and 9(C), party status, FMBB asserts that it has an interest in "the protection of agricultural soils in their immediate neighborhood" because "[t]he loss of agricultural soils on this site, along with the presence of a dense housing development adjacent to a working farm, *is likely to lead to the demise of agriculture in this area of South Burlington over time.*" *FMBB March 2, 2001 Petition for Party Status* at 5 (emphasis added). While FMBB's interest in protecting present farming operations is relevant to a consideration of party status under Criterion 9(B) (because subcriterion (iv) of Criterion 9(B) directly addresses a

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<sup>4</sup> As a result of this decision, the Board does not reach FMBB's Petition for EBR 14(B)(2) party status on Criterion 9(B).

project's impacts on continuing agricultural activities on adjoining lands), there is no comparable subcriterion within Criterion 9(C). See, *Nile and Julie Duppsstadt & Deborah and John Alden*, #4C1013 (Corrected)- EB, Memorandum of Decision at 2 - 6 (Nov. 25, 1998).

Likewise, as to Criterion 9(K), FMBB has stated insufficient grounds to support a grant of party status. As FMBB itself notes, the inquiry into traffic safety under Criterion 9(K) is different from that under Criterion 5. The Board has written:

Under Criterion 5, the Board looks to see whether a proposed project will create traffic conditions which are unsafe or traffic congestion which is unreasonable. The Board may not deny a project simply because such conditions are present. In contrast, under Criterion 9(K), the Board examines whether a proposed project will *materially jeopardize or interfere* with a public facility's function, safety, or efficiency, or the public's use or enjoyment of or access to such facilities. Because public facilities include public highways, traffic conditions on those highways may be examined under Criterion 9(K), and if material jeopardy or interference will be created, the proposed project may be denied. Thus, the inquiry into traffic safety under Criterion 9(K) involves a higher threshold of material jeopardy or material interference, which is absent from the language of Criterion 5. This conclusion is consistent with the fact that a proposed project may not be denied under Criterion 5 but may be denied under Criterion 9(K).

*Swain Development Corp. and Philip Mans*, #3W0445-2-EB, Findings of Fact, Conclusions of Law, and Order at 34 (Aug. 10, 1990) (emphasis in original); *accord*, *Upper Valley Regional Landfill*, #3R0609-EB, Findings of Fact, Conclusions of Law, and Order at 46 (Nov. 12, 1991).

As the threshold inquiry on the merits of an application is higher under Criterion 9(K) than it is under Criterion 5, it is logical to impose a higher showing of an interest for a person who seeks party status under Criterion 9(K) as well.

FMBB's stated interest in Criterion 9(K) is identical to its stated interest in Criterion 5 - - the safety of its members who drive and walk on Van Sicklen Road. While this interest may have been sufficiently substantial to provide the basis for the Commission's grant of party status under Criterion 5, the Board does not find it to rise to the "material jeopardy or material interference" level to be sufficiently substantial for EBR 14(B)(1) party status under Criterion 9(K).



**b. EBR 14(B)(2) party status**

Nor does the Board find that FMBB qualifies for EBR 14(B)(2) "materially assisting" party status for Criteria 9(C) or 9(K).

As the Board has written, "Mere assertions of an interest do not satisfy Rule 14(B)(2); rather, party status under EBR 14(B)(2) is sparingly granted, usually to a person with specific expertise who can assist the District Commission or Board in addressing particularly complex, novel, or unfamiliar project." *Stonybrook Condominium Owners Association*, Declaratory Ruling #385, Memorandum of Decision at 3 (May 19, 2000), *quoting Springfield Hospital*, #2S0776-2-EB, Memorandum of Decision at 7, (Aug. 14, 1997), *quoting Re: Spring Brook Farm Foundation, Inc.*, #2S0985-EB, Memorandum of Decision at 3 (Oct. 3, 1995) (internal quotation marks omitted).

Here, the issues presented by this case under Criteria 9(C) and 9(K) are not particularly complex, novel, or unfamiliar. The Board often addresses such Criteria within its decisions. As importantly, FMBB has not demonstrated that it has particular expertise that would assist the Board in this Declaratory Ruling. *Stonybrook; Springfield Hospital*.

**c. Whether review of Criteria 1(E), 1(G), 4, and 5 by the Board is foreclosed under the doctrines of *res judicata*<sup>5</sup> and/or collateral estoppel, or should not otherwise be undertaken.**

VSLP argues that FMBB is collaterally estopped from raising claims that the Project does not comply with Criteria 1(E), 1(G), 4, 5, and 9(K). Because the Board has denied FMBB party status on Criterion 9(K), it need not address VSLP's estoppel arguments on this Criterion.

VSLP asserts that the Board's *Duppstadt* decision (to which FMBB was a party) found that the *Duppstadt* project complied with Criteria 1(E), 1(G), 4, and 5. The present application, VSLP claims, involves a proposed subdivision which has substantially fewer environmental impacts under those Criteria than did the *Duppstadt*

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<sup>5</sup> Although elements of *res judicata* and collateral estoppel are similar, neither party briefed *res judicata* and the Board will therefore not specifically address it here.

subdivision. Therefore, since the parties and the facts have not changed (or if the facts have changed, they have gotten *better* from an environmental standpoint in terms of their impact on the Criteria), FMBB should be precluded from relitigating Criteria 1(E), 1(G), 4, and 5. *VSLP Memorandum, April 26* at 1 –10. <sup>6</sup>

The doctrine of collateral estoppel, also known as "issue preclusion," bars "the subsequent relitigation of an issue which was actually litigated and decided in a prior case between the parties resulting in a final judgment on the merits, where that issue was necessary to the resolution of the action." *Berlin Convalescent Center v. Stoneman*, 159 Vt. 53, 56 (1992), *quoting, American Trucking Ass'ns v. Conway*, 152 Vt. 363, 370 (1989). The Vermont Supreme Court has held that collateral estoppel is appropriate where:

(1) [i]t is asserted against one who was a party or in privity with a party in the earlier action; (2) the issue was resolved by a final judgment on the merits; (3) the issue is the same as one raised in the later action; (4) there was a full and fair opportunity to litigate the issue in the earlier action; and (5) applying preclusion in the later action is fair.

*Cold Springs Farm Development, Inc. v. Ball*, 163 Vt. 466, 469 (1995), *quoting Trepanier v. Getting Organized, Inc.*, 155 Vt. 259, 265 (1990). *Accord, In re Tariff Filing of Central Vermont Public Service Corp.*, 12 Vt. L.W. \_\_\_\_ (Feb. 9, 2001); *and see, Olchowik v. Sheet Metal Workers' International Ass'n*, 875 F.2d 555, 557 (6th Cir. 1989), *citing, Montana v. United States*, 440 U.S. 147, 153 (1979); *Dominic A. Cersosimo and Dominic A. Cersosimo Trustee and Cersosimo Industries Inc.*, #2W0813-3 (Revised) –EB, Findings of Fact, Conclusions of Law, and Order at 16 (April 19, 2001).

The purposes of the doctrine are

(1) to conserve the resources of the courts and the litigants by protecting them against piecemeal or repetitive litigation; (2) to prevent vexatious

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<sup>6</sup> FMBB counters, *inter alia*, that this matter, while styled by the Commission as a reconsideration, is actually a new application *FMBB April 26 Memorandum* at 2. FMBB asserts that this cannot be a reconsideration, because VSLP was not the original applicant. FMBB fails to notice, however, that the reconsideration request was filed on behalf of VSLP *and* John and Deborah Alden. The Aldens were co-applicants in the *Duppstadt* case.

litigation; (3) to promote the finality of judgments and encourage reliance on judicial decisions; and (4) to decrease the chances of inconsistent adjudications.

*In re Tariff Filing of Central Vermont Public Service Corp.*, 12 Vt. L.W. at \_\_\_\_.

There is no question that collateral estoppel is available in the administrative context. Applying collateral estoppel to administrative decisions in the zoning context, our Supreme Court has held that:

Although collateral estoppel does not apply to administrative proceedings as an inflexible rule of law, the principles of *res judicata* and collateral estoppel generally apply in zoning cases as in other areas of the law.

*In re Carrier*, 155 Vt. 152, 157-58 (1990).

*Carrier* further established the general rule for applying the doctrine of collateral estoppel in zoning cases:

[A]s a general rule, a zoning board or commission "may not entertain a second application concerning the same property after a previous application has been denied, *unless a substantial change of conditions had occurred or other considerations materially affecting the merits*" of the request have intervened between the first and second applications. *Silsby v. Allen's Blueberry Freezer, Inc.*, 501 A.2d 1290, 1295 (Me. 1982).

*Carrier*, 155 Vt. at 158 (emphasis added). As the Court noted, this rule "provides some finality" and "protects the integrity of the process." *Id.* The underlying concerns of finality and integrity are equally applicable in the context of the Act 250 process.

The Board examines each element of the collateral estoppel doctrine in turn.

#### **1. asserted against a party or one in privity in the earlier action**

First, the doctrine may only be asserted "against one who was a party or in privity with a party in the earlier action." VSLP seeks to assert collateral estoppel against FMBB, which was a party to the *Duppstadt* case. FMBB argues, on the other hand, that collateral estoppel cannot apply because VSLP was not a party to the *Duppstadt* case. *FMBB Memorandum May 3* at 4.

Collateral estoppel may be asserted "*against* one who was a party" to the earlier action. *Trepanier*, 155 Vt. at 265. The doctrine does not require that the party who seeks the benefits of the doctrine must also have been a party to the earlier case. Under a plain reading of *Trepanier's* statement of the first element of the doctrine, a person who was *not* a party to an earlier proceeding can assert that *another* person who was a party to the proceeding is estopped from relitigating issues that were decided by that earlier proceeding. FMBB's arguments in this regard therefore fail.

**2. issue must have been resolved by a final judgment on the merits**

Second, the issue for which collateral estoppel is sought must have been "resolved by a final judgment on the merits." There was a judgment by the Board on Criteria 1(E), 1(G), 4 and 5; it is this judgment that VSLP seeks to be given preclusive effect. In response, FMBB argues that, since the *Duppstadt* case was the subject of an EBR 31(B) reconsideration motion, there was no final judgment. *FMBB May 3 Memorandum* at 5. FMBB also asserts that EBR 31(B) and 10 V.S.A. §6087(c) supersede concepts of *res judicata* and collateral estoppel, because the Rule allows the Commission to reopen all or part of the prior decision to address project changes or new evidence. *FMBB April 26 Memorandum* at 5 – 6.

Rule 31(B)(1) permits an applicant for a permit which has been denied to move for reconsideration of the denial within six months of the decision. To be successful in such motion the applicant must certify that the deficiencies in its application have been corrected. Rule 31(B)(2) states:

(2) Scope of review. The district commission may, but need not necessarily, limit its scope of review to those aspects of the project or application which have been modified to correct deficiencies noted in the prior permit decision. The findings of the board or district commission in the original permit proceeding shall be entitled to a presumption of validity in the reconsideration proceeding, insofar as those findings are not affected by proposed modifications in the project. However, those presumptions may be rebutted by the district commission or by any party upon a showing that the circumstances of the application have changed, or upon a review of evidence not previously presented

*See, Re: Gary Savoie, #2W0911-EB (Reconsideration), Findings of Fact, Conclusions*

of Law, and Order at 3 (Aug. 27, 1997). "(W)here circumstances warrant a more exhaustive review, due to project changes, different impacts, or new evidence, the Commission has the discretion to broaden its review.")

In effect, the language of EBR 31(B)(2) restates the second element of collateral estoppel: a finding will be considered to be final and given preclusive effect as long as the Commission does not find changed circumstances or wish to review new evidence. Thus, EBR 31 and 10 V.S.A. §6087(c) do not supersede the doctrine of collateral estoppel; rather, they implement its terms.

In this case, since only Criteria 8, 9(B) and 10 constituted the basis for the Board's denial of the *Duppstadt* project, the EBR establish a presumption that the Criteria 1(E), 1(G), 4 and 5 remain valid, but only "insofar as those findings are not affected by proposed modifications in the project." Thus, if the VSLP Project does not affect the *Duppstadt* findings as to Criteria 1(E), 1(G), 4 and 5, VSLP can rely on those findings. Here, however, the Commission apparently believed that the VSLP Project affected the *Duppstadt* findings to a degree sufficient to trigger a reexamination of Criteria 1(E), 1(G), 4 and 5.

Whether or not the Board's *Duppstadt* findings are "final" depends on whether the Commission should have reopened Criteria 1(E), 1(G), 4 and 5 on review, an issue raised by VSLP in its cross-appeal. The answer to this question necessarily depends on whether the redesigned elements of the VSLP Project affect the Board's *Duppstadt* findings. The answer to this question, in turn, depends on whether the *Duppstadt* and VSLP projects are sufficiently "the same," (the third collateral estoppel element) at least in terms of those aspects of the projects that implicate Criteria 1(E), 1(G), 4 and 5.

### **3. issue must be the same in both actions**

Third, for collateral estoppel to apply, the issue in the earlier action must be "the same as one raised in the later action." VSLP asserts that its subdivision, as it is a substantial redesign of the earlier *Duppstadt* project which garnered the Board's approval on Criteria 1(E), 1(G), 4 and 5, is either the same as, or more environmentally friendly than, the *Duppstadt* project.

FMBB argues that the issues are not the same because the issue in the *Duppstadt* case was whether the *Duppstadt* project complied with Act 250, and the issue here is whether VSLP's project complies. *FMBB May 3 Memorandum* at 4-5.

FMBB's arguments present the ultimate question that the Board must answer. If the projects are dissimilar in important respects - in that the changes that appear in the second project affect the findings made in the first - then, under EBR 31(B), collateral estoppel should not prevent FMBB from seeking review of those changes. But if the projects are identical except for minor, unimportant differences - differences which have no impact on the Board's *Duppstadt* findings - then collateral estoppel should bar relitigation of issues which have already been decided, even if VSLP is a different applicant from *Duppstadt*.

VSLP has provided a strong *prima facie* case, in the form of its Affidavit of Certification, to support its claim that its Project is environmentally equal to or better than the *Duppstadt* project, at least in terms of Criteria 1(E), 1(G), 4 and 5. From what appears in the Affidavit, it appears that the Project has been redesigned to decrease its impacts on streams, wetlands, erosion and traffic from those which, though present in the *Duppstadt* project, nevertheless achieved Board approval. The Affidavit, however, is not evidence that has been admitted before the Board in this proceeding. It has not been subject to cross-examination; FMBB has not had the opportunity to rebut its statements before the Board. While, on its face, it provides ample argument to sustain a collateral estoppel claim, the Board presently does not have sufficient facts before it to conclude that the issues present in VSLP's Project are the same (or, indeed, better than) those which existed in the *Duppstadt* case.

While the VSLP Project appears to represent a scaled-back version of the *Duppstadt* proposal, it has undergone some changes. It may well be that VSLP can provide sufficient evidence to the Board to support a claim that the surrounding facts (such as the amount of traffic on Van Sicklen Road, or the flow of the stream and the extent of the wetlands) have not changed, or have only changed in insignificant ways. But the Board does not have before it, at this time, conclusive evidence on which to base findings that the VSLP Project is a more environmentally friendly subdivision than the *Duppstadt* project and that other surrounding factors are substantially the same, so as not to cause concerns that were not addressed when the Board decided *Duppstadt*.<sup>7</sup>

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<sup>7</sup> FMBB argues that the Board should hold a hearing to determine whether it needs further facts concerning the changes in the Project and the changes surrounding the Project. *FMBB May 3 Memorandum* at 1 – 3. VSLP appears to agree that the Board should "conduct its own comparative review of the original project with the revised, certified project" in order to determine what scope of review is appropriate within an EBR 31 reconsideration. *VSLP May 3 Memorandum* at 4.

VSLP argues that FMBB has not presented the Board with anything more than "general, unsupported allegation[s]" that the new design has the potential for impacts under the Criteria. *VSLP May 3 Memorandum* at 5. This misplaces the burdens; the party asserting that collateral estoppel and *res judicata* should apply has the burden to establish their elements. *Farrell v. Mountain Folk, Inc.*, 169 Vt. 568, 569-70 (1999); *State v. Pollander*, 167 Vt. 301, 305 (1997); *Ianelli v. Standish*, 156 Vt. 386, 388 (1991). Here, the question is whether or not the issues to be decided in the subsequent action are the same as those which were earlier decided. VSLP, not FMBB, must present evidence that the changes (or non-changes) to the Project are not of a sufficient magnitude to warrant reexamination.

#### **4. full and fair opportunity to litigate the issue**

Fourth, there must have been a "full and fair opportunity to litigate the issue in the earlier action." FMBB certainly had the opportunity to litigate the Criteria 1(E), 1(G) and 4 in the *Duppstadt* case, and, again, as to these Criteria, the question is whether there has been enough of a change in facts between the *Duppstadt* and the VSLP projects to make the issues no longer the same.

FMBB did not, however, have the opportunity to litigate Criterion 5 in the *Duppstadt* case, as it was not granted party status in that matter. Thus, the failure of this element precludes the imposition of collateral estoppel against FMBB as to Criterion 5.

The Board will therefore allow VSLP to make further argument on this element of the doctrine as it relates to Criteria 1(E), 1(G) and 4 as to FMBB, and as it relates to Criteria 1(E), 1(G), 4 and 5 as to other parties.<sup>8</sup>

#### **5. applying preclusion in the later action must be fair**

Finally, the Board must find that the catchall provision – that "applying preclusion in the later action is fair" – has been met. Based upon the uncertainties concerning whether the issues are the same, the Board cannot make a determination as to this collateral estoppel element at this time.

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<sup>8</sup> The Board notes that VSLP has argued that Williston *did* have an opportunity to litigate all Criteria in the *Duppstadt* case

In sum, the Board believes that VSLP's Affidavit of Certification provides compelling indications that collateral estoppel may be applicable in this case. It will, however, follow the counsel of its decision in *Town of Stowe*, #100035-9-EB, Findings of Fact, Conclusions of Law, and Order at 40 (May 22, 1998), and not attempt to decide questions of law or fact until all parties have had the opportunity to present evidence and argument.

**D. Whether this matter should be reviewed for compliance with Criterion 9(K).**

The Commission did not review the Project for compliance with Criterion 9(K). FMBB appealed the Commission's failure to review Criterion 9(K), specifically the impact of the Project's traffic on Van Sicklen Road. FMBB links the need for review under Criterion 9(K) to the review under Criterion 5. *FMBB's Notice of Appeal*.

While the Board has denied FMBB party status to present evidence or argument under Criterion 9(K), this does not mean that the Criterion cannot be reviewed. And while FMBB cannot participate in this review, this does not automatically bar the Town of Williston Selectboard and Planning Commission and the South Burlington Planning Commission, as statutory parties, 10 V.S.A. § 6085(c)(1) and EBR 14(A)(3), from doing so. The fact that neither Town appealed this issue to the Board does not preclude the Board's review, as a party need not file a duplicitous cross-appeal of a Criterion which has been appealed by another. *Re: Green Peak Estates, Inc.*, #8B0314-2-EB, Memorandum of Decision at 2 - 3 (Sept. 24, 1986), *aff'd In re Green Peak Estates*, 154 Vt. 363, 372 (1990). *Accord, City of Montpelier and Ellery and Jennifer Packard*, F9711-WFP, Memorandum of Decision at 4 - 9 (Jan. 20, 2000).

While the Towns may therefore present the Criterion 9(K) issue to the Board within the context of this appeal, the Towns have not done so; they have presented no argument to the Board as to why the Commission should have reviewed the VSLP Project for compliance with Criterion 9(K). Indeed, the Towns have presented no briefing on any of the Preliminary Issues, nor have they indicated that they intend to rely on the arguments presented by FMBB.

The Board therefore has no briefing on this point from the Towns and will not attempt to discern, on its own, the reasons why the Commission may have been in error in not reviewing this Criterion. *See Perrott v. Johnson*, 151 Vt. 464, 467 (1989) (Court will not search for errors not supported by argument), *citing In re Wright*, 131 Vt. 473, 490 (1973).



The Board therefore concludes that the Project should not be reviewed for compliance with Criterion 9(K).

While VSLP asserts that review of Criterion 9(K) is foreclosed by collateral estoppel; as the Board will not review the Criterion for the reason given above, it need not reach VSLP's collateral estoppel arguments.

**E. Whether the Board should conduct a site visit of the Project Tract in the Spring of 2001.**

FMBB seeks a site visit in the Spring so that the Board can observe the amount of water that exists and flows through the site. *FMBB's April 26 Memorandum* at 6 – 7. VSLP has no objection to a site visit "once the Board has ruled on the preliminary issues." *VSLP's May 3 Memorandum* at 6.

The Board declines to hold an early site visit for several reasons. First, FMBB's request is based on its belief that Spring conditions will be significantly wetter than those which the site experiences at other times of the year. This has, however, been an exceptionally dry Spring season, and the Board is therefore not convinced that the site will exhibit particularly wet conditions. Second, those Criteria before the Board which would be most profoundly implicated by a finding that the site is wet, Criteria 1(E), 1(G) and 4, may be the subject of disposition under VSLP's collateral estoppel claims. The Board believes that its should visit the site within the context of the hearing on those claims. Finally, FMBB is free to present witnesses who will testify and present exhibits as to nature of the conditions at the site, so a visit by the Board at this time is not warranted.

**F. Williston Planning Commission (party status)**

The Williston Planning Commission, by notice filed April 20, 2001, informed the Board that it had voted to join with the Williston Selectboard as a party this action. The Williston Planning Commission is a statutory party. 10 V.S.A. §6085(c)(1) and EBR 14(A)(3)

### **III. Order**

1. FMBB's *April 10, 2001 Motion to Dismiss* is granted. FMBB therefore has party status on Criteria 1(E), 1(G), 4, 5, 8, and 10.
2. FMBB's petition for EBR 14(B)(1) party status for Criteria 9(B) is granted.
3. FMBB's petition for party status for Criteria 9(C) and 9(K) is denied.
4. VSLP's motion to bar review of Criteria 5 as to FMBB is denied.
5. VSLP's motion to bar review of Criteria 1(E), 1(G), and 4 (and 5 as to parties other than FMBB) pursuant to the doctrine of collateral estoppel is denied at this time, but will be the subject of further hearing.
6. Criterion 9(K) will not be considered by the Board in this appeal.
7. FMBB's request that the Board take an early site visit this Spring is denied.
8. A Scheduling Order establishing filing and hearing dates will be issued.
9. The Williston Planning Commission may participate in this appeal as a statutory party. 10 V.S.A. §6085(c)(1) and EBR 14(A)(3).

Dated at Montpelier, Vermont this 8<sup>th</sup> day of June 2001.

ENVIRONMENTAL BOARD

/s/Marcy Harding\_\_\_\_\_

Marcy Harding, Chair

John Drake

George Holland

Samuel Lloyd

W. William Martinez

Rebecca M. Nawrath

Alice Olenick

Bob Opel

Don Sargent

Members Nawrath and Opel participated only in the deliberations concerning FMBB's petition for party status on Criterion 9(B).

Members Drake, Holland, Martinez and Nawrath would deny FMBB EBR 14(B) party status on Criterion 9(B).

Member Sargent would grant FMBB party status on Criterion 9(C).